

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

EDWARD J. WRENN,

Plaintiff,

04-CV-6115T

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

DECISION
and ORDER

Defendant.

Plaintiff, Edward Wrenn ("plaintiff") brought this action pursuant to the Social Security Act (the "Act"), codified at 42 U.S.C. §§ 405(g) and 1383(c)(3), seeking review of a final decision of the Commissioner of Social Security ("Commissioner"), denying his application for Disability Insurance Benefits, and Supplemental Security Insurance. By Decision and Order dated May 17, 2005, I granted plaintiff's motion for judgment on the pleadings, and remanded the case to the Commissioner for calculation and payment of benefits. By motion dated August 26, 2005, plaintiff's attorney seeks \$5,407.50 in attorney's fees, representing 35 hours of billable time at a rate of \$154.50 per hour. Defendant opposes plaintiff's motion on grounds that the motion was not timely filed.

The Equal Access to Justice Act provides that a party seeking an award of attorneys' fees or other expenses under the act "shall, within thirty days of a final judgment in the action, submit to the court an application for fees and other expenses"

28 U.S.C. 2412(d)(1)(B). In this case, because the Commissioner

did not appeal this court's Decision and Order, the judgment became final on July 25, 2005, the last day on which the Commissioner could have filed an appeal. Accordingly, plaintiff was required to file his motion for fees on or before August 25, 2005, which was thirty days after July 25, 2005. Plaintiff, however, did not file his motion for fees until August 26, 2005, and therefore, the motion is untimely. Moreover, even if the court could toll the limitations period, there is no apparent basis in the record for granting such relief. Accordingly, because plaintiff's application for fees is untimely, I deny plaintiff's motion for an award of attorney's fees.

ALL OF THE ABOVE IS SO ORDERED.

S/Michael A. Telesca

MICHAEL A. TELESKA
United States District Judge

DATED: Rochester, New York
December 8, 2005